

1 the San Juan County Shoreline Master Program ("SJCSMP"). Near the water, the property is
2 bisected by a County road. The waterfront property is low bank, and extends along the water
3 for approximately 185 feet. The Worthingtons also own three chains of tidelands. They have
4 owned their shoreline property for about six years
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6 II

7 Sometime in the 1950's or 60's, the County placed rock riprap, on the waterward side
8 of the road, for stabilization purposes.

9 III

10 On August 12, 1991, Worthington placed a structure consisting of three cubic yards of
11 concrete and beach rock on his beach, adjacent to a wooden stairway and landing. His
12 purpose was to gain the benefit of having a dry place on the beach, at high tide. The structure
13 rises approximately three feet above the elevation of the beach. It is located adjacent to and
14 waterward of the toe of the slope leading up to the County road. It is about 4 feet wide by 18
15 feet long. Its length parallels the toe of the slope. Leading up to it on either side are concrete
16 ramps, which are about six feet by six feet and three feet by six feet, located on the west and
17 east ends of the structure, respectively.

18 IV

19 The first noticeable upland vegetation, in the vicinity of the structure occurs at or above
20 the toe of the slope. The structure frequently becomes submerged at high tide.

21 V

22 The County Planning Department, on November 13, 1991, issued an enforcement
23 order to Worthington, directing him to remove the concrete, restore the beach to its original
24 condition, and pay a \$1000.00 fine. Worthington appealed this order to the County.
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1 Commissioners on November 16, 1991 The Board of County Commissioners heard his
2 appeal on March 17, 1992.

3 VI

4 The County Commissioners, on April 1, 1992, concluded by resolution, that
5 Worthington had undertaken development on the shorelines of the County without a
6 conditional use permit under the Shoreline Management Act ("SMA"). They ordered that the
7 development be removed within 30 days, and reduced the fine to \$500.00. Worthington did
8 not appeal the civil penalty decision to the Board.

9 VII

10 Worthington, on March 18, 1992, applied for an "after the fact" shoreline permit from
11 the County. He described the project in the application as: "[h]igh water dinghy platform
12 consisting of existing rock wall concrete binder 3' x 18'" The proposed use was to "[a]llow
13 for more convenient access to beach" On March 19, 1992, Worthington filled out a State
14 Environmental Policy Act ("SEPA") checklist for the project.

15 VIII

16 On April 13, 1992, Worthington completed a Hydraulic Project Application to submit
17 to the Department of Fisheries ("Fisheries") On April 21, 1992, Brian Williams, the
18 Regional Habitat Manager for Fisheries met with Worthington on the site On May 13, 1992,
19 Mr. Williams' supervisor, R. Timothy Flint wrote to Worthington, explaining that Fisheries
20 does not issue after- the-fact Hydraulic Project Approvals ("HPA"). Mr. Flint noted that
21 although Worthington had constructed a rock/concrete bulkhead, prior to obtaining an HPA,
22 Fisheries would not pursue legal action, because this was Worthington's first violation of the
23 Hydraulic Code, and it was done in absence of knowledge that an HPA was required prior to
24 the construction Fisheries requested that Worthington modify the bulkhead, so that it not
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1 extend waterward of the ordinary high water line more than six feet. Fisheries also noted that
2 Worthington's site was located west of and adjacent to a documented smelt spawning beach
3 Brian Williams had observed that riprap from the County road had migrated onto the beach
4 and potentially degraded suitable smelt spawning habitat. He concluded that Worthington's
5 removal of riprap from the beach, to construct his bulkhead, had potentially enhanced the
6 suitability of the beach for smelt spawning.
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8 IX

9 Jeff Otis, Senior Planner for the County reviewed Worthington's proposal against the
10 policies of SMA and against the SJCSMP. He observed that the County had made a
11 Determination of Non-Significance for the project, under the State Environmental Policy Act
12 ("SEPA"), on June 24, 1992. He nevertheless, recommended, in a July 24, 1992 report to the
13 County Commissioners, that the shoreline conditional use permit be denied. He concluded
14 that under the SJCSMP, the structure did not constitute a bulkhead, a dock or pier, but rather
15 landfill. As such, because it was located waterward of the ordinary high water mark, it was
16 prohibited by the SJCSMP. He ultimately determined that the structure did not meet all the
17 applicable requirements for a shoreline conditional use permit.

18 X

19 The County Commissioners, on August 18, 1992, adopted the proposed findings and
20 conclusions of the Planning Department, and denied the shoreline conditional use permit.

21 XI

22 Worthington appealed the permit denial to the Board, on September 22, 1992. His
23 appeal was certified to the Board by Ecology and the Attorney General, as stating valid reasons
24 for review, on October 2, 1992.
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XII

Fisheries sent Worthington a letter dated February 8, 1993, insisting that he remove that portion of the bulkhead lying more than six feet waterward of the ordinary high water line, by March 15, 1993. Sometime before the hearing before this Board, Worthington complied with this directive. Nevertheless, at the time of the hearing, as described in the shoreline application, the concrete structure was essentially in place.

XIII

Pea gravel, which forms the prime habitat for smelt, exists on the beach, in the vicinity of Worthington's platform, almost to the toe of the slope. Worthington's platform, at the time of the hearing may have constituted a minor intrusion into this area.

XIV

No credible evidence was presented that the County road was eroding where riprap had been placed

XV

No comparable structures, to that constructed by Worthington, exist along the beach of Blind Bay.

XVI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the shoreline permit issues. RCW 90.58.180. The Board's jurisdiction over shoreline civil penalties is limited to appeals of civil penalties issued by Ecology. RCW 90.58 210(4). For this reason, and because Worthington did not appeal

1 the civil penalty issued by the County to this Board, we do not have the authority to address
2 the civil penalty in this decision
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4 II

5 Worthington, having appealed the County's denial of a shoreline conditional use
6 permit, bears the burden of proof before the Board. RCW 90.58.140(7)

7 III

8 Conditional uses, like variances, are exceptions to the rule. The SMA is to be liberally
9 construed on behalf of its purposes. RCW 90.58.900, Clam Shacks v Skagit County, 109
10 Wn.2d 91, 93, 97, 743 P.2d 265 (1987). See Mead School Dist. v Mead Education, 85
11 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the
12 Open Public Meetings Act implies an intent that the Act's exceptions be narrowly confined).

13 IV

14 The purpose of the Rural Environment is to.

15 *protect agricultural and timber lands from urban and suburban expansion, to*
16 *restrict intensive development along undeveloped shorelines and to maintain*
open spaces and opportunities for recreational and other uses compatible with
agricultural activities.

17 SJCSMP, section 16.40.404. The shoreline along Blind Bay, shoreward of the County road,
18 is essentially undeveloped. The Worthington structure represents an artificial intrusion into
19 that open-space environment, and in our opinion, conflicts with the above-stated purpose of the
20 Rural Environment.

21 V

22 Landfill is defined by the SJCSMP as "a dry, upland area created by the filling or
23 deposition of sand, soil, and/or gravel into a wetland area. SJCSMP, section 16.40.512.
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1 Landfills are not permitted below the line of ordinary high tide. Id. "Regulations by
2 Environment".

3 VI

4 We conclude the structure, which is comprised of rock, sand and gravel, constitutes
5 landfill, under the above definition.

6 VII

7 The above definition states that a landfill occurs in a wetland area. Yet, the later
8 section prohibits landfills below ordinary high tide. While this language is awkward, the only
9 way to reconcile these two statements, without nullifying either, is to conclude that the
10 reference to landfill in a wetland area is locational only, and does not serve any function in
11 defining what is a landfill. Wetland areas, under the SMA, are those areas of the shoreline,
12 above the ordinary high water mark. The obvious intent of the SJCSMP, in both sections
13 referred to above, is to prohibit landfills below that line.

14 VIII

15 Ordinary high tide, as used in the SJCSMP, is synonymous with the ordinary high
16 water mark. SJCSMP, section 16.40.1301(80). Ordinary high water mark is defined in the
17 SMA as:

18 *the mark on all . . . tidal water, which will be found by examining the beds and*
19 *banks and ascertaining where the presence and action of waters are so common*
20 *and usual, and so long continued in all ordinary years, as to mark upon the soil*
21 *a character distinct from that of the abutting upland, in respect to vegetation, as*
22 *that condition exists on June 1, 1971, as it may naturally change thereafter . . .*
PROVIDED, that in any area where the ordinary high water mark cannot be
found, the ordinary high water mark adjoining saltwater shall be the line of
mean higher high tide . . .

23 RCW 90.58.030(2)(b) We conclude that the ordinary high water mark, on the site in
24 question, is at or above the toe of the slope Thus, the landfill falls below that line.

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IX

The SJCSMP declares that: "uses which are specifically prohibited by this Master Program shall not be authorized". SJCSMP, section 16.40.903(3). This is consistent with Ecology's regulations governing conditional uses. WAC 173-14-140(3). Under this rule, the Worthington landfill cannot be authorized as a conditional use, because it is located waterward of the ordinary high tide.

X

The Worthington proposal for a dinghy platform is not a permitted use under the SJCSMP. It is not a pier or dock, as defined in the SJCSMP. Section 16.40.508 states that "a pier or dock is a platform structure extending from the shore and built to sit over and float upon the water". The Worthington structure does not float upon the water, and therefore falls outside this definition.

XI

Likewise, the structure is not a bulkhead, as defined in the SJCSMP. Section 16.40.506 defines bulkheads or seawalls, as: "structures erected parallel to and near the high water mark for the purpose of protecting the adjacent uplands from the action of waves or currents". Worthingtons's structure intrudes several feet below the ordinary high water mark, and is not designed to protect the adjacent uplands from the action of waves or currents. Rather, it is designed to provide a platform from which to enjoy the beach at high tide.

XII

The SJCSMP classifies as conditional uses, the following uses. 1) those which are explicitly permitted under the Master Program, solely as conditional uses; 2) those which constitute the expansion of non-conforming uses; and 3) those which are "unnamed and/or not contemplated in" the Master Program. SJCSMP, section 16.40.902(1)(a)-(c). Worthington's

1 proposal for a dinghy platform is not named nor contemplated in the Master Program.
2
3 Therefore, it falls in the third category.

4 XIII

5 Such uses, under the SJCSMP, may only be allowed if the applicant can demonstrate,
6 in addition to the criteria contained in section 16 40.903(1) 1 "that extraordinary circumstances
7 preclude reasonable use of the property in a manner consistent with the use regulations of the
8 Master Program"

9 XIV

10 The SJCSMP contains the following criteria, all of which must be met, before a
11 shoreline conditional use permit may be granted:

- 12 a. that the proposed use is consistent with the policies of RCW 90.58.020 and the
- 13 policies of the Master Program,
- 14 b. that the proposed use will not interfere with the normal public use of public
- 15 shorelines;
- 16 c. that the proposed use of the site and design of the project is compatible with
- 17 permitted uses within the area;
- 18 d. that the proposed use will cause no unreasonably adverse effects to the shoreline
- 19 environment in which it is to be located; and
- 20 e. that the public interest will suffer no substantial detrimental effect.

21 SJCSMP, section 16.40.903(1)(a)-(e).

22 XV

23 In addition, the SJCSMP requires that:

24 *[i]n the granting of all conditional use permits, consideration shall be given to*
25 *the cumulative impact of additional requests for like actions in the area. For*
26 *example, if conditional use permits were granted for other developments in the*
27 *area where similar circumstances exist, the total of the conditional uses shall*
also remain consistent with the policies of RCW 90.58.020 and shall not
produce substantial adverse effects to the shoreline environment.

1 This reference is actually to WAC 173-14-140(1), of Ecology's regulations governing
conditional uses. However, since the language of SJCSMP, section 16.40.903(1) and the
above regulation are almost identical, the Board presumes that the County intended the
reference to be to its own master program.

1 SJCSMP, section 16.40.903(4).

2
3 **XVI**

4 All of the above conditional use criteria are consistent with Ecology's regulations
5 concerning conditional uses. WAC 173-14-140

6 **XVII**

7 Worthington's structure is inconsistent with the policies of RCW 90.58.020 and the
8 SJCSMP, which severely restrict landfill in tidal areas. Moreover, a dinghy platform does not
9 need to be located over the water, but could be located upland. Accordingly, the proposal is
10 inconsistent with SJCSMP, section 16.40.903(1)(a).

11 **XVIII**

12 Worthington has satisfied his burden of showing that the proposal will not interfere
13 with the normal public use of public shorelines. The proposal is, therefore, consistent with
14 SJCSMP, section 16.40.903(1)(b).

15 **XIX**

16 Worthington has not shown that his proposal is compatible with permitted uses in the
17 area. His is the only such structure of its kind shown to be on the tidelands of Blind Bay. His
18 proposal is inconsistent with SJCSMP, section 16.40.903(1)(c).

19 **XX**

20 We have previously found that Worthington's proposal is inconsistent with the
21 definition of the Rural Environment, in which it lies. Accordingly, we conclude that the
22 proposal is inconsistent with SJCSMP, section 16.40.903(d). We do so mindful that the
23 County concluded that this project would not have any significant adverse environmental
24 effects under SEPA. We conclude, however, that the precedential impact of a use such as this
25 in a Rural Environment, is unreasonable and inconsistent with the intent of that environment.

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XXI

We likewise believe that the public interest would be adversely affected, if this proposal were approved. First, it was built without the necessary permit. The SMA proscribes construction on permits until all review proceedings before the Board are terminated. RCW 90.58.140(5)-(6). No development is to occur on the shorelines of the state which is inconsistent with the policies of the SMA and the relevant master program. These policies require that shoreline permits be obtained before construction commences on the shoreline. The reason for this requirement is to avoid a fait accompli, or to pressure decision-makers into approving a project without reasoned review. Secondly, the precedential nature of the project is such that if approved, it presumably would be more difficult to deny similar such proposals, under like circumstances, in the future. This is adverse to the public interest and is inconsistent with SJCSMP, section 16.40.903(1)(e).

XXII

Similarly, the proposal is inconsistent with SJCSMP, section 16.40.903(4). The cumulative impact of similar structures would clearly be contrary to the basic policy of the SMA to preserve the natural shorelines of the state to the greatest extent feasible. RCW 90.58.020.

XXIII

Finally, Worthington has failed to prove that extraordinary circumstances preclude him, or his family, from reasonable use of the property, in a manner consistent with the use regulations of the SJCSMP. His beach is accessible to him and his family, without this dinghy platform. When he bought this property the beach was covered by water, up to the road embankment, during high tides. He should not be allowed to create an artificial "beach" above the high tide, to the detriment of the policies of the SMA and the SJCSMP.

1
2 **XXIV**

3 John and Genavie Nichols submitted a letter to the Board, on August 23, 1993, in
4 which they contest ownership of a portion of the tidelands, upon which the landfill lays We
5 do not consider the evidence as admissible for two reasons: first; it is irrelevant because this
6 Board lacks jurisdiction to adjudicate property disputes. DOE v. Kitsap County, SHB No. 93
7 (1974); Plimpton v. King County, SHB NO. 84-23 (1985); second, the evidence was not
8 served on the other parties.

9 **XXV**

10 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
11 From the foregoing, the Board issues this:
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ORDER

1. The County's denial of Worthington's after-the-fact shoreline conditional use permit application is upheld.


2. Worthington is ordered, consistent with hydraulic permit approval requirements, to remove the entire concrete dinghy platform and accompanying concrete ramps, which he constructed in violation of the SMA, within 30 days of the date of the order.

DONE this 31st day of August, 1993.

SHORELINES HEARINGS BOARD


ROBERT V. JENSEN, Presiding Officer


RICHARD C. KELLEY, Member


BOBBI KREBS-MCMULLEN, Member


MIKE MORTON, Member


O'DEAN WILLIAMSON, MEMBER

S92-47F